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BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ON THE SUBJECT OF "WHAT IS THE BUSH ADMINISTRATION'S RECORD IN REGULATORY REFORM?"
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Mr. Chairman and members of the subcommittee, thank you for inviting me here today to testify about the Office of Management and Budget's (OMB) efforts to improve the quality of federal regulations by obtaining public nominations of federal rules that should be reformed, revised, or eliminated. I am William Kovacs, Vice President of Environment, Technology, and Regulatory Affairs at the U.S. Chamber of Commerce (U.S. Chamber). The U.S. Chamber is the world's largest business federation, representing more than three million businesses of every size, sector, and region. More than 96% of the U.S. Chamber's members qualify as small businesses.

The U.S. Chamber cares deeply about the cost and quality of federal regulations, and believes firmly that every federal agency should periodically review and assess the continued need for, and relevance of, the rules it enforces. Before beginning, it is worth noting that the cost of federal regulations have become truly staggering. According to a widely cited report sponsored by the United States Small Business Administration's Office of Advocacy (SBA's Office of Advocacy), the annual cost of all federal regulations is estimated to be $843 billion.[1] This amount is only $17 billion more than all federal discretionary spending in 2003,[2] and $144 billion less than all individual income taxes paid in 2003.[3] The annual cost of environmental regulations alone is $197 billion,[4] which is $3 billion more than all corporate income taxes that were paid in 2003.[5] The impact of federal regulations is especially severe on small businesses. For example, the SBA's report shows that the annual cost of all federal regulations is, on a per employee basis, $6,975 for firms with fewer than 20 employees–nearly 60% higher than the $4,463 for companies with 500 or more employees.[6]

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[1] W. Crain and T. Hopkins, *The Impact of Regulatory Costs on Small Firms*, Report RFP No. SBAHQ-00-R-0027 for The Office of Advocacy, U.S. Small Business Administration (July 2001).
[2] See Table 8.7 - Outlays for Discretionary Programs: 1962 – 2009; Budget of the United States Government - Fiscal Year 2005, Historical Tables.
[3] *Treasury Department Gross Tax Collections: Amount Collected by Quarter and Fiscal Year, 1987 – 2004*. SOI Bulletin, Historical Table. Excel ver. 4. Issued Quarterly, Internal Revenue Service, Statistics of Income Division.
[4] Ibid, Footnote 1, Page 25.
[5] Ibid, Footnote 3.
[6] Ibid, Footnote 1, Page 3.

In my testimony today, I want to make three key points:

1) Repeated attempts have been made over the years by presidents and Congress alike to require federal agencies to periodically review, revise, and, when appropriate, eliminate unnecessary regulations, but these efforts have met with limited success.
2) OMB's current public nominating process is valuable, but its lack of transparency makes it difficult, if not impossible, to determine what is being done with the nominations.
3) It is very important that these efforts at regulatory reform continue and become ingrained in agency practices.

I. REPEATED ATTEMPTS HAVE BEEN MADE OVER THE YEARS BY PRESIDENTS AND CONGRESS ALIKE TO REQUIRE FEDERAL AGENCIES TO PERIODICALLY REVIEW, REVISE, AND, WHEN APPROPRIATE, ELIMINATE UNNECESSARY REGULATIONS, BUT THESE EFFORTS HAVE MET WITH LIMITED SUCCESS

In seeking to confront the growing cost, complexity, and burden of federal regulations, there have been a number of attempts to require federal agencies to periodically evaluate the continued benefit and value of federal regulations. These efforts are commonly referred to as regulatory "look back" requirements[7] and have been initiated through a variety of executive orders, statutory provisions, and OMB directives.

A. Executive Orders

Over the years, several presidents have required federal agencies to periodically review existing regulations to determine whether they should be modified or eliminated. These efforts are documented in a series of reports issued by the General Accounting Office (now known as the Government Accountability Office) (GAO) to a Senate subcommittee in the late 1990s.[8] As GAO reported:

- These efforts began when President Carter issued Executive Order 12044, Improving Government Regulations, in 1978. The Executive Order established requirements for the centralized review of regulations, the preparation of regulatory analyses, and the consideration of alternatives, and also required federal agencies to "periodically" review their existing regulations.[9]

[7] See, for example, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Office of Management Budget, 2002, Pages 70-71.
[8] *Statement of L. Nye Stevens to Government Affairs Subcommittee on Financial Management and Accountability*, GAO/T-GGD-96-185, September 25, 1996, Pages 14-16.
[9] Ibid, Footnote 8. Executive Order 12044, *Improving Government Regulations*, stated that the periodic review of regulations was necessary to determine: whether the regulations are as clear and simple as possible; achieve legislative goals effectively clearly and efficiently; and do not impose unnecessary burdens on the economy, individuals, private organizations, or State and local government. See, 43 *Federal Register* 12661 (March 24, 1978).

- The process continued in 1992 when President Bush sent a memorandum to all federal agencies calling for a 90-day moratorium on new proposed regulations. During this time the agencies were to "evaluate existing regulations and programs and to identify and accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth."[10]

- In 1993, President Clinton enhanced this process with the issuance of Executive Order 12866, Regulatory Planning and Review.[11] Section 5 of the order requires that each federal agency, beginning in 1994, submit a program to OMB's Office of Information and Regulatory Affairs (OIRA) to "periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated ..."[12]

- President Clinton also ordered a "page by page" review of all regulations in 1995, seeking to "eliminate or revise those that were outdated or in need of reform."[13]

While well intentioned, none of these presidential efforts has resulted in a systematic review, identification, and elimination of burdensome or outmoded federal regulations. Indeed, nearly all of the items listed in the spring 2004 edition of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*[14] (Unified Agenda) involve new regulatory proposals, and the Unified Agenda does not even list existing regulations subject to review under Section 5 of Executive Order 12866.

B. Section 610 of the Regulatory Flexibility Act

By far, the most widely cited statutory "look back" requirement for federal agencies is Section 610 of the Regulatory Flexibility Act of 1980 (Regulatory Flexibility Act).[15] Section 610 of the act specifically requires each federal agency to develop a plan for the periodic review of regulations that have, or will have, a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether each rule should be retained, amended, or rescinded (consistent with the objectives of the underlying statute) to minimize its impact on small entities.

Under the Section 610 review process, each federal agency must publish annually in the *Federal Register* a list of the existing rules that it plans to review in the coming year.[16] Agencies are required to describe the rules, note why they are needed, and invite public comment on them.

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[10] Ibid.
[11] Ibid.
[12] 58 *Federal Register* 51735 (September 30, 1993). According to Executive Order 12866, *Regulatory Planning and Review*, all significant regulations selected for review are required to be included in the agency's annual Regulatory Plan, which becomes incorporated into the *Unified Agenda of Regulatory and Deregulatory Actions* (Unified Agenda). The review of existing rules under Executive Order 12866 applies to all "significant" regulations, which encompass a broad range of rules affecting businesses of all types and sizes.
[13] Ibid, Footnote 8.
[14] See, http://ciir.cs.umass.edu/ua/Spring2004/databases.html.
[15] 5 U.S.C. 601 et seq.
[16] While Section 610 does not require federal agencies to use the Unified Agenda for these notices, most agencies do because it is a convenient way to compile and publish this information.

The agencies must consider the continued need for the rule, any public complaints/comments received from the public about the rule, the rule's complexity, whether it overlaps, duplicates, or conflicts with other rules, and any conditions that have changed since the rule's adoption. Section 610 also requires that all rules in existence at the time the law became effective, 1980, must be reviewed within 10 years (i.e., January 1, 1991), and that any new rule must be reviewed within 10 years of the date it became effective.

Like the presidential efforts to require federal agencies to review and eliminate outmoded regulations, Section 610 has been widely perceived as ineffective for reviewing existing regulations. For example:

- In the late 1990s, GAO conducted a series of studies on agency compliance with Section 610, and concluded that agency compliance was inadequate.[17] GAO found that agencies were confused about which rules were covered by Section 610. Agencies were also confused about how, and when, to assess the economic impact of rules, and how to provide proper public notice about the reviews being conducted. GAO also noted that various terms applying to Section 610, such as "significant economic impact" and "substantial number of small entities," were unclear and needed clarification.

- Another study, sponsored by the SBA's Office of Advocacy,[18] concluded that Section 610 "has been the weakest and least utilized provision of the [Regulatory Flexibility Act]."[19] Specifically, the report notes that few of the total number of rules in existence are actually reviewed. Further, the reports notes that Section 610 does not specifically require any regulatory changes and the law's public participation provisions have been ineffective. The report recommends the creation of a database where all rules that significantly impact small entities (either because they currently have, or previously had, a significant economic impact on a substantial number of small entities) can be listed, and for SBA's Office of Advocacy to issue an annual score card of agency compliance.[20]

C. OMB's Regulatory Reform Nominating Process

Under the current Bush administration, OMB has sought to identify regulatory reform suggestions through a process of direct public nominations. While OMB could use Section 5 of Executive Order 12866, which requires the periodic review of existing regulations, OMB has relied instead on authority granted by Congress under the Regulatory Right-to-Know Act.[21] The Regulatory Right-to-Know Act requires OMB to issue an annual report to Congress on the costs and benefits of regulations, including recommendations for reform. OMB has candidly

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[17] Ibid, Footnote 8.
[18] *An Evaluation of Compliance with the Regulatory Flexibility Act by Federal Agencies*, CONSAD Research Corporation, April 15, 2001 (Revised July 16, 2001).
[19] It should be noted that several of the reforms recommended by GAO and the SBA's Office of Advocacy-sponsored study have been implemented, including the creation of an index of Section 610 reviews in the Unified Agenda, the issuance of a compliance guidance by SBA's Office of Advocacy, and better coordination between SBA's Office of Advocacy and OIRA (as a result of Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*).
[20] Ibid, Footnote 16, Pages 59-60.
[21] 31 U.S.C § 1105 note, Pub. L. 106-554, § 1(a), December 21, 2000.

acknowledged that "while broad reviews of existing regulations have been required [under previous and existing Executive Orders], they have met with limited success."[22] For this reason, OMB stated that it would establish a "modest process" for accepting public nominations of agency rules to review and improve.[23] Accordingly:

- In 2001, OMB requested nominations of regulations "that if rescinded or changed would increase public welfare by either reducing costs or increasing benefits."[24] In response, OMB received 71 reform nominations from a variety of stakeholders and academic institutions. Of these, 23 were designated by OMB as "high priority" reform candidates and forwarded to the respective federal agencies for action.

- In 2002, OMB requested public nominations of burdensome regulations and guidance documents to reform, rescind, or revise. OMB noted that it was particularly interested in nominations from three specific areas: 1) reforms to existing regulations that, if adopted, would increase overall net benefits to the public (including extending or expanding existing regulatory programs, simplifying or modifying existing rules, or rescinding outmoded or unnecessary rules); 2) regulations, guidance documents, and paperwork requirements that impose especially large burdens on small entities; and 3) problematic guidance documents that should be reformed.[25] OMB received some 1,700 comments from a broad cross-section of interested parties. The nominations encompassed some 316 individual regulations and guidance documents across 26 federal agencies.[26]

- Finally, in 2004,[27] OMB specifically requested nominations of regulations and paperwork burdens that had a negative impact on manufacturing (especially those negatively impacting small and medium-sized businesses). OMB has yet to post the full list of nominations on its Web site, so it is not clear how many individual nominations were received, or how many are duplicates from previous years.

For the reasons described in the following discussion, the OMB effort has been one of limited success.

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[22] Ibid, Footnote 7, Page 70.
[23] Ibid. Page 71.
[24] *Making Sense of Regulation: 2001Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Office of Management Budget, 2002, Page 4.
[25] *Draft Report to Congress on the Costs and Benefits of Regulations*, 67 *Federal Register* 15015 (March 28, 2002).
[26] Because OMB received so many nominations in 2002, it divided the reform candidates into three categories: Category 1 included nominations already undergoing agency review (including some of the 2001 submissions); Category 2 included nominations of independent agencies (not subject to OMB oversight); and Category 3 included nominations that were forwarded to executive branch agencies for evaluation (and possible action). OMB forwarded all of the nominations to the respective agencies for review, but specifically asked them to evaluate and prioritize the "Category 3" nominations. OMB established a specific timeframe within which the agencies were asked to respond.
[27] In 2003, OMB did not request public nominations of reform candidates, but rather sought comment on its revised Circular A-4, *Regulatory Analysis*, for conducting regulatory impact analysis.

II. OMB'S CURRENT PUBLIC NOMINATING PROCESS IS VALUABLE, BUT TS LACK OF TRANSPARENCY MAKES IT DIFFICULT, IF NOT IMPOSSIBLE, TO DETERMINE WHAT IS BEING DONE WITH THE NOMINATIONS

The OMB nominating process, while valuable, suffers from two basic deficiencies: 1) the review process lacks transparency; and 2) OMB fails to provide the public with timely updates about the status of nominations.

For example, OMB provided an update on the 2001 "high priority" nominations in its final 2003 report, but the update includes only a few brief sentences about each nomination, making it difficult to know how the nominations are being reviewed, what transpired in the review process, or where things stand with respect to the completion of the process. In addition, the information provided is dated (now more than a year old), making it useless to rely upon and no doubt leading to duplicate nominations of the same regulations in succeeding years. The information provided about the active 2002 nominations suffers from the same drawbacks, and, as noted previously, OMB has not yet posted a list of the manufacturing-related nominations submitted in 2004.

To ascertain the current status of the OMB nominations, last summer the U.S. Chamber contacted all of the nominators of the active nominations from 2001 and 2002 and requested an update on the status of their nominations. While some of the nominators were familiar with their nominations, many did not know what had been done with them and were, not surprisingly, frustrated with the entire process. This hardly instills confidence that regulatory reform is being taken seriously or will succeed.

III. IT IS VERY IMPORTANT THAT THESE EFFORTS AT REGULATORY REFORM CONTINUE AND BECOME INGRAINED IN AGENCY PRACTICES

The U.S. Chamber believes that it is important to require every federal agency to periodically review its existing regulations to assess their continued benefit and value. This vital effort should continue and be strengthened to ingrain the practice of periodic review into federal agency procedures. However, it seems obvious that the difficulty of imposing retroactive regulatory review requirements on federal agencies has been underestimated. There appears to be greater resistance to this process on the part of federal agencies than many believed would arise. That said, there are still a number of specific reforms that could be undertaken to improve and strengthen the process. Specifically:

A. What Congress Could do Today

- Congress should maintain vigorous oversight of agency compliance with Section 610. Congressional committees should insist that federal agencies under their jurisdiction identify regulations in need of review, report to Congress on when these reviews will take place, and provide information on the results of the reviews.

- Congress should clarify that every regulation must undergo a Section 610 review if the regulation had a significant economic impact on a substantial number of small entities: 1) when the rule was first promulgated; or 2) during the 10-year timeframe for review established by Section 610. Congress should not accept the excuse that agencies are confused as to the timing for the reviews and should make the timing for reviews very clear.

B. What the SBA Office of Advocacy Could do Today

- The SBA's Office of Advocacy should incorporate Section 610 training into the current Regulatory Flexibility Act training it is performing in accordance with Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking.

- The SBA's Office of Advocacy should maintain on its Web site a list of Section 610 reviews currently underway, and include a hyperlink to the regulation in the Unified Agenda. The inclusion of an index of Section 610 reviews in the Unified Agenda has been an important reform that has increased the visibility of the Section 610 review process.

- The SBA's Office of Advocacy should prepare a score card on Section 610 compliance, including recommendations for reform.

C. What the White House and OMB Could do Today

- The president should issue an executive order requiring that any significant regulation, as defined by Executive Order 12866, be reviewed within 10 years of its promulgation, and should include a formal regulatory impact analysis (in accordance with OMB Circular A-4, Regulatory Analysis). The regulatory impact analysis should consider whether initial cost and benefit forecasts were accurate, and assess the expected future costs and benefits of the rule, as well as any feasible alternatives.

- OMB should continue its public nominating process as an interim measure, but it must provide more timely, accurate, and transparent information on the status of the regulatory nominations.

- OMB should post all of the nominations it receives on its Web site, and provide timely status reports about them. Further, any items slated for action by OMB, or by an agency, also should be posted in the Unified Agenda, with a hyperlink to the OMB Web site list.

- OMB should also issue formal guidance to federal agencies about how agencies should review regulatory nominations, and provide specific criteria to be used to assess the merits of each nomination.

- OMB should require that a separate index of active OMB nominations be included in the Unified Agenda, as has been done with Section 610 reviews.

CONCLUSION

There has been a long-standing effort to require every federal agency to periodically review the continued need for, and relevance of, the rules it enforces. This process is critical to ensuring that regulations are sound, balanced, and cost-effective. Congress must not abandon its oversight role in this area, particularly since reform efforts led by OMB are subject to change with each new administration's personnel and priorities. Accordingly, the U.S. Chamber applauds the subcommittee for holding this hearing today. It is abundantly clear that burdensome, costly, or outmoded rules greatly impede the ability of businesses to create new jobs or offer better benefits to their employees.

The U.S. Chamber is grateful for the opportunity to present its views and recommendations about this important topic.